DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-207771, et al. **DATE:** February 28, 1983

MATTER OF: Environmental Aseptic Services Administration and Larson Building Care Inc.

DIGEST:

1. Performance Requirements Summaries in IFBs for services contracts which permit the Government to deduct from the contractor's payments an amount representing the value of several service tasks where a random inspection reveals a defect in only one task imposes an unreasonable penalty, unless the agency shows the deductions are reasonable in light of the particular procurement's circumstances.

2. Air Force regulation concerning the development of a statement of work and quality assurance plan for base-level services contracts implements Air Force policy and is for the benefit of the Government, not potential offerors. Therefore, the Air Force's alleged failure to comply with the regulation does not provide a basis for protest.

3. Performance Requirements Summaries in IFBs for services contracts which permit the Government to deduct amounts from the contractor's payments for unsatisfactory services do not conflict with any reperformance rights of the contractor. Although the standard "Inspection of Services" clause permits the Government to require reperformance at no cost to the Government, the protester had failed to show that defective services may be reperformed without the Government receiving reduced value.

Environmental Aseptic Services Administration and Larson Building Care Inc. have submitted a number of protests[1] concerning the methodology employed by the Air Force to acquire various base-level services, including hospital housekeeping, custodial services, grounds maintenance and stocking commissary shelves. The thrust of the protests is that the invitations for bids implement a quality assurance program that allegedly permits payment deductions for unsatisfactory service greatly exceeding the value of the services.

We sustain the protests on the basis that the quality assurance provisions provide for unreasonable deductions.

The protesters also complain that these provisions provide for permanent deductions without regard to alleged reperformance rights of the contractors. We find this basis of protest to be without merit.

All the invitations apparently incorporated by reference the standard Inspection of Services clause contained in Defense Acquisition Regulation (DAR) § 7-1902.4 (1976 ed.). The clause generally must be included in all Air Force fixed price service contracts. See DAR § 7-1902. It reserves the Government's right to inspect all services, to the extent practicable, at all times during the contract term, and also provides as follows:

> "If any services performed hereunder are not in conformity with the requirements of this contract, the Government shall have the right to require the Contractor to perform the services again in conformity with the requirements of the contract, at no additional increase in total contract amount. When the services to be performed are of such a nature that the defect cannot be corrected by reperformance of the services, the Government shall have the right to (i) require the Contractor to immediately take all necessary steps to ensure future performance of the services in conformity with the requirements of the

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[1] These protests are identified in the Appendix.

> contract; and (ii) reduce the contract price to reflect the reduced value of the services performed.* * **

The invitations contain additional provisions under the heading Performance Requirements Summary (PRS) that permit the Government to sample the contractor's performance of some services randomly and deduct payments for unsatisfactory service in an amount calculated to represent the value the unsatisfactory service bears to all the contract's requirements. To determine that value, the PRS breaks the total contract effort down to its basic component services. The value of unsatisfactory performance under a component service is determined by calculating the percentage any sampled unsatisfactory performance bears to the size of the entire sample, and then multiplying it times a fixed percentage listed in the IFB which represents the value of the component service in comparison with the total contract effort. In some instances, however, the invitations provide an allowable deviation for which the Government will not take any deductions.

For example, an IFB for hospital housekeeping services establishes a format for randomly inspecting room cleaning (only one of several services required by the IFB) where the contractor must clean 236 rooms daily and the sample unit is one room on any given day. If we assume the following:

(a) the contract price for the performance period being sampled, e.g., 1 month, is $10,000;
(b) the IFB fixes the relative value of room cleaning at 60 percent of the total contract, or $6,000 of the total contract price;
(c) the Government samples 200 room cleanings out of the possible 7080 cleanings in the month (236 rooms x 30 days); and
(d) the Government's random sampling procedures reveal defects in 40 room cleanings,

then the deduction would be as follows:

$$\frac{40 \text{ (defects)}}{200 \text{ (sample size)}} \times .60 \text{ (percentage value of room cleaning)} \times \$10{,}000 \text{ (total price)} = \$1{,}200$$

The PRS provisions state that these deductions are permanent, but the Government nevertheless can require the contractor to reperform the unsatisfactory services.

Concerning only those services not surveyed by sampling, the PRS provides that a defect will not be counted when the service can be reperformed in a timely manner. Neither the PRS nor any other IFB provision defines random sampling, however, so that it apparently could involve the Government's inspection of one unit or all the units in a lot. The IFB contains an informational copy of the Quality Assurance Evaluator (QAE) Surveillance Plan detailing the sampling procedures, including a statistical basis for determining the frequency of inspections and the size of the sample.

The protesters have two basic complaints regarding the PRS's methodology. The first is that the sampled service often subsumes several required tasks, and the contractor's failure to perform satisfactorily any one of these tasks provides a basis to deduct payment for all of the tasks. Using the room cleaning example, the QAE Surveillance Plan establishes a checklist of 14 items (e.g., aseptic floor, furniture, fixtures, drapes, and trash) representing different tasks required by the IFB, and the PRS provides, "If a task fails, the room fails for that day." In other words, if the contractor unsatisfactorily performs only one task in each of the 40 rooms, he will suffer the same deduction as though he failed to perform all 14 tasks in each room. Thus, any deductions will be based on the value of all 14 tasks and will greatly exceed the value of the one task (trash collection, for example) actually failed. The protesters allege that these deductions violate the Air Force's own policy directives contained in Air Force Regulation 400-28, Vol. I, September 26, 1979, and exceed the agency's needs. They contend that the contractor's increased monetary risks occasioned by the deductions for an entire service will increase the overall cost to the Government, presumably through higher bid prices and decreased competition. In this regard, we note that Larson was apparently unwilling to take the risks involved and did not submit bids under the IFBs involved.

Secondly, the protesters complain that the IFBs also permit the Government to require reperformance at the contractor's expense in the case of sampled services. The protesters contend that the standard Inspection of Services clause (quoted above) and standard specification No. MIL-STD-1050, April 29, 1963 (MIL. SPEC.), which is mandatory for use by the Department of Defense, DAR § 1-1202(a)(ii), give the contractor general rights to reperform services after deficiencies are noted, subject to reinspection

before the Government can reduce the contractor's payments. In particular, the protesters rely on the following MIL. SPEC. provision as establishing a contractor's right to reperformance without deduction:

> "Rejected units may be repaired or corrected and resubmitted for inspection with the approval of, and in the manner specified by, the responsible authority." Paragraph 6.2.

The Air Force really does not address the protesters' complaint that the IFBs permit deductions which are unreasonably excessive, except to suggest this issue involves a matter of contract administration which this Office should not review. We disagree.

Although a contractor, during performance, may challenge deductions pursuant to the disputes clause of the contract, that does not mean potential bidders cannot protest the validity of solicitation clauses which may violate procurement principles. While we recognize that the establishment of inspection procedures to insure that services will meet the Government's needs is primarily the responsibility of the contracting agencies, we will question determinations about the provisions included in a solicitation for this purpose if the provisions are shown to restrict competition unduly or otherwise violate procurement statutes and regulations. Inflated Products Company, Inc., B-190877, March 21, 1978, 78-1 CPD 221.

For reasons stated below, we believe the IFB's quality assurance provisions violate applicable procurement regulations contained in DAR § 1-310, concerning liquidated damages. The alleged violations of Air Force Regulation 400-28, however, are another matter. This regulation prescribes the methodology for developing the statement of work and a quality assurance plan for base-level services contracts, and implements Air Force policy concerning these matters. The regulation thus sets out instructions clearly for the benefit of the Government, not potential offerors, and the agency's alleged failure to comply with it does not provide a basis for protest. See Moore Service, Inc., et al., B-204704.2, B-204704.3, B-205374, B-205374.2, June 4, 1982, 82-1 CPD 532; Westinghouse Information Services, B-204225, March 17, 1982, 82-1 CPD 253.

Liquidated damages are fixed amounts which one party to a contract can recover from the other upon proof of violation of the contract, and without proof of the damages

actually sustained. See Kothe v. R.C. Taylor Trust, 280 U.S. 224 (1930). While a liquidated damages provision obviously benefits the Government in that it permits contract deductions as described, DAR § 1-310 imposes certain limitations on the use of liquidated damages that clearly are for the contractor's benefit.

The regulation limits the use of such damages to instances where the time of performance is such an important factor that the Government may reasonably expect to suffer damages if the performance is delinquent, and the extent or amount of such damages would be difficult or impossible to ascertain or prove. DAR § 1-310(a). The regulation further provides that when a liquidated damages clause is used, the contract must set forth the amount to be assessed against the contractor for each calendar day of delay, and the rate must be reasonable in light of the procurement requirements. DAR § 1-310(b). Finally, the regulation expressly recognizes that liquidated damages fixed without reference to probable actual damages may be held to impose a penalty and therefore be unenforceable. DAR § 1-310(b). In this respect, while such damages might add an effective spur to satisfactory performance, it is well-settled that such a penalty to deter default is improper and unenforceable. Priebe & Sons v. United States, 332 U.S. 407 (1947).

We will object to a liquidated damages provision as imposing a penalty if a protester shows there is no possible relation between the amounts stipulated for liquidated damages and the losses which are contemplated by the parties. 46 Comp. Gen. 252 (1966); Massman Construction Co., B-204196, June 25, 1982, 82-1 CPD 624. We believe the protesters initially met this burden by showing that the solicitation provisions permit deductions without regard to, and significantly in excess of, the value of tasks actually found defective. In the example of the hospital housekeeping services invitation, the IFB's QAE Surveillance Plan lists 14 tasks which comprise room cleaning, fixes the value of these tasks at 60 percent of the contract price, and the PRS authorizes a deduction for the entire room cleaning service if the contractor fails to perform any one of the tasks. The protesters point out that under circumstances very similar to this example, the Armed Services Board of Contract Appeals held that the Government's "all or none" inspection procedure, employed to inspect rooms serviced under a custodial services contract, imposed an unfair and unreasonable penalty. Clarkies, Inc., ASBCA No. 22784 (1981), 81-2 BCA ¶ 15,313.

It therefore is incumbent on the Air Force to show, in response to the protester's showing, that there indeed is a reasonable basis for its measure of damages. Cf. Professional Helicopter Services, B-202841, B-203536, March 17, 1982, 82-1 CPD 251 (concerning the Government's burden to present a reason why an apparently restrictive specification was necessary). We recognize that not all contract tasks may have the same importance,and that some tasks may be of such importance that a deduction for an entire service would be warranted, rather than simply a pro rata amount, if the task is not performed properly. For instance, a contractor's failure to perform a single cleaning task in surgical or ward areas may render the entire room unsatisfactory because of the critical need for hygiene in those areas, whereas failure to perform one task in an administrative area should have no such effect. The IFB for hospital services, however, draws no distinction between surgical or ward areas and administrative areas for purposes of deductions.

The Air Force's failure to respond to these protests with a rationale as to why defective performance of any task in a service, without regard to the nature or seriousness of the task, warrants deduction for the entire service compels us to conclude that the IFB provision in issue imposes a penalty as to nonvital tasks and would, as the protesters indicate, unnecessarily raise the Government's costs and have an adverse effect on competition. We therefore sustain the protest to that extent.

Regarding the alleged inconsistency between provisions permitting permanent deductions and alleged reperformance rights established in the standard Inspection of Services clause and the mandatory MIL. SPEC., we believe the protesters have not established the existence of such rights concerning randomly sampled services under any of the procurements in issue here.

The Inspection of Services clause gives the Government the right, where performance is unsatisfactory, to require reperformance at no additional increase in the contract amount, and to reduce the contract price to reflect the reduced value of the services performed when the services "are of such a nature that the defect cannot be corrected by reperformance of the services." The clause does not expressly bestow any rights on the contractor, and

explicitly recognizes that circumstances may exist where reperformance would not correct a deficiency. The clause thus reserves, for that situation, the Government's right "to (i) require the contractor to immediately take all necessary steps to ensure future performance of the services in conformity with the requirements of the contract; and (ii) reduce the contract price to reflect the reduced value of the services performed." (Emphasis added.)

We find nothing in the MIL. SPEC. which detracts from this right. Paragraph 6.2, on which the protesters rely, does not require that the Government permit reperformance without regard to the circumstances; rather, it simply allows the Government to permit reperformance.

Therefore, the critical question is whether the services here may be reperformed after random sampling so that the Government does not receive reduced value. The Air Force contends that while defective services may be reperformed to bring them up to contract standards, the standards are thus achieved in an untimely manner, and time of performance is an important part of the IFBs' requirements. Moreover, when a contractor reperforms a sampled service, it cannot correct the entire lot to meet the quality and time requirements of the contract. Therefore, the Air Force argues, it has the right to deduct payments to reflect the reduced value of the services performed. In this respect, the Air Force also points out that the IFBs require the contractor to establish a quality assurance plan for which the Air Force presumably must pay. Any defect revealed during sampling indicates the contractor's failure to administer its plan properly, and represents a further reduction in value to the Government.

The protesters, who bear the burden of submitting sufficient evidence to establish their case, see Line Fast Corporation, B-205483, April 26, 1982, 82-1 CPD 382, have not shown that, under the IFBs involved here, defective services may be reperformed without the Government's receiving reduced value for them. We therefore must accept the agency's position. See Alan Scott Industries--reconsideration, B-201743, et al., April 1, 1981, 81-1 CPD 251. Accordingly, the protests lack merit in their contentions that the deductions provisions are inconsistent with reperformance rights under the IFBs.

The protests are sustained in part concerning the provisions that permit allegedly excessive deductions. We are recommending to the Secretary of the Air Force that the deduction provisions be examined to determine where individual tasks are so vital as to warrant a deduction for the entire service. Where bids have not been opened, we are recommending that the Air Force amend the IFBs to differentiate between vital and non-vital tasks and to establish reasonable deduction rates for non-vital tasks, e.g., a pro rata deduction in the same proportion as the task bears to the total number of tasks comprising the service. Where contracts have been awarded, or where bids have been opened and the needs of the agency do not readily permit canceling an IFB and reissuing a revised one, we are pointing out to the Air Force that in administering the contracts it should avoid taking unreasonable deductions for non-vital tasks but instead should pursue its other remedies under the contract so that it will not run the risk of implementing the deduction provisions in a manner that imposes a penalty.

The protests are denied concerning alleged conflicts between provisions that permit deductions and alleged reperformance rights.

Milton J. Socolar

for Comptroller General
of the United States